

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

STARBUCKS CORPORATION

Employer

and

WORKERS UNITED

Petitioner

Case No.: 03-RC-294186

**STARBUCKS CORPORATION’S OPPOSITION TO PETITIONER’S REQUEST FOR
REVIEW REGARDING THE REGIONAL DIRECTOR’S DECISION TO PERMIT
EVIDENCE PURSUANT TO 29 C.F.R. § 102.66(c)**

Starbucks Corporation (“Starbucks” or “Employer”) respectfully submits this brief in opposition to Petitioner Workers United’s (“Petitioner” or “Union”) request for review of the Regional Director’s “failure to bar evidence before or at the pre-election hearing.” (RFR at p. 1). As set forth herein, Petitioner’s Request for Review (“RFR”) provides no valid basis for disturbing the Regional Director’s decision. Petitioner’s RFR should be denied as it fails to satisfy a proper ground on which review may be granted under the Board’s Rules & Regulations. Moreover, the Union previously filed a remarkably similar request for review just last month in case No. 03-RC-292127 (“Williamsville Place”). In that case, on May 9, 2022, the National Labor Relations Board rejected the Union’s request on the grounds that “it raise[d] no substantial issues warranting review.” (Board Order). The Board explained in a footnote that it “encourage[d] Regional Directors to consider whether it would be appropriate to use the offer-of-proof procedure specified

in C.F.R. § 102.66(c) in cases involving duplicative or cumulative litigation.” *Id.* Accordingly, the Regional Director correctly adhered to that directive and permitted Starbucks to introduce evidence at the representation hearing held on May 6, 2022.

BACKGROUND

Petitioner began this matter by filing a representation petition on April 18, 2022 to represent a single store unit at 3015 Niagara Falls Boulevard, East Amherst, New York 14228 (“East Robinson”) (BE 1(a)). Starbucks timely filed its statement of position arguing for, among other things, a market-wide unit in Buffalo, New York. (BE 3). Petitioner filed a responsive statement of position shortly thereafter arguing for a single-location unit. (BE 4). Next, Petitioner filed a motion to bar the receipt of evidence absent an offer of proof on April 28, 2022. (BE 5). The Regional Director issued an order on May 2, 2022 requiring Starbucks to submit an offer of proof (“Order”). (BE 1(e)). Starbucks then opposed the Union’s motion to exclude on May 4, 2022, (BE 8), and complied with the Regional Director’s Order and filed its offer of proof. (BE 6). On May 4, 2022, Petitioner filed its own response to the Regional Director’s Order. (BE 7).

At the hearing on May 6, 2022, the Hearing Officer, acting for the Regional Director, ruled on the Union’s motion to exclude. The Regional Director granted the Union’s motion to the extent that Starbucks was not permitted to introduce evidence from its regional director and district manager because it was “duplicative of the information that’s already been entered into the record” in previous hearings. (Hearing Tr. at 10:21-25). However, the Regional Director denied the Union’s motion to bar Starbucks from presenting interchange data and analysis. The Regional Director allowed the interchange data to come in because it was “relevant to this proceeding, and to the Employer’s position regarding single versus” multilocation bargaining unit. (Hearing Tr. at 10:11-20) (cleaned up).

Following the hearing and submission of post-hearing briefs, the Regional Director, on May 18, 2022, issued a Decision and Direction of Election (“D&DE”) for a single-location unit, which was exactly the outcome Petitioner sought. On May 26, 2022, Petitioner filed the instant RFR regarding the Regional Director’s decision permitting Starbucks to introduce evidence at the pre-election hearing.

ARGUMENT

PETITIONER DOES NOT MEET THE STANDARD FOR THE RELIEF IT SEEKS

Petitioner’s RFR should be denied as the Regional Director correctly permitted Starbucks to introduce evidence as to employee interchange at the pre-election hearing. Further, Petitioner has waived the arguments it seeks to raise here. At no point at the hearing did Petitioner refuse to proceed. Likewise, at no point during the hearing did Petitioner seek to adjourn to appeal the Regional Director’s decision to take evidence from Starbucks. Moreover, Petitioner did not raise these arguments in its post-hearing brief, which is further evidence of its waiver. Rather, Petitioner waited until after issuance of the D&DE to raise these issues. Thus, Petitioner waived any such arguments.

Even if such arguments were not waived, Petitioner’s RFR fails to set forth any basis upon which the NLRB may grant review. Granting a request for review is an exceptional remedy, only granted where a compelling reason exists, such as a significant error of law or fact which would alter the outcome of the decision. *See Metropolitan Opera Assn., Inc.*, 327 NLRB 740 (1999) (denying request for review where party “failed to present ‘compelling reasons’ for granting review.” (citing Board’s Rules and Regulations Sec. 102.67(c)); see also *Constellation Brands v. NLRB*, 842 F.3d 784 (2d Cir. 2016) (noting that “the Board’s review is discretionary and granted only in limited circumstances.”).

Thus, the NLRB's Rules & Regulations provide that the "Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted **only upon one or more**" of four grounds. 29 C.F.R. § 102.67(d) (emphasis added). Specifically, Section 102.67(d) permits review where there is: (1) a substantial question of law or policy is raised because of the absence of or departure from officially reported Board precedent; (2) the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party; (3) the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; and (4) there are compelling reasons for reconsideration of an important Board rule or policy. 29 C.F.R. § 102.67(d)(1)-(4). Petitioner fails to state under which of the aforementioned grounds the NLRB should grant review, presumably because none of the grounds are met.

Instead of adhering to the NLRB's Rules, Petitioner essentially argues that the Regional Director's decision to permit Starbucks to present evidence at the hearing was a mistake of law because she misapplied Rule 102.66(c). As a result of this misapplication, Petitioner argues, it was prejudiced because it attended a "sham" and "meaningless" hearing. Contrary to Petitioner's claims, the Regional Director's decision to permit Starbucks, a party to a pre-election hearing, to present evidence at such hearing is wholly consistent with NLRB precedent, and memorialized in its Rules. Accordingly, as detailed below, Petitioner's request does not meet the criteria of Rule 102.67(d), and there is no compelling reason for the Board to grant Petitioner's request for review.

I. The Regional Director Correctly Applied Rule 102.66(c) in Allowing Starbucks to Introduce Evidence, Thus, Ground #1 for Petitioner's RFR is Unavailable.

The bulk of Petitioner's argument is premised on the position that the Regional Director misapplied Rule 102.66(c), however, Petitioner misreads the rule and Board policy. Rule 102.66(c), which governs offers of proof, specifically provides, "[i]f the Regional Director

determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received. **But in no event shall a party be precluded from introducing relevant evidence otherwise consistent with this subpart.**" 29 C.F.R. § 102.66(c) (emphasis added). The rule gives the Regional Director discretion to determine the sufficiency of the offer of proof. The NLRB's Casehandling Manual further emphasizes the Regional Director's discretion by providing that she "will direct the Hearing Officer regarding the issues to be litigated at the hearing." (Casehandling Manual – Part Two at 11226).

Additionally, the NLRB's Rules & Regulations recognize that the development of an evidentiary record during the representation hearing is vital to determining the appropriateness of the petitioned-for unit, which is one function of the hearing. Section 9(b) of the NLRA requires the Board to determine the appropriate unit for collective bargaining in each case. Through the pre-election hearing process, the Board is obliged to give the parties the "fundamental requisite due process" to appear and be heard "at a meaningful time and in a meaningful manner." *Alaska Comm'ns Sys's. v. NLRB*, 6 F.4th 1291, 1298 (D.C. Cir. 2021) (quoting *Goldberg v. Kelley*, 397 U.S. 254, 267 (1970)). To that end, the Board's own regulations require the hearing officer to "inquire fully into all matters and issues necessary to obtain a full and complete record." 29 C.F.R. § 102.64(b). In the "investigatory context" of a pre-election hearing, "all persons concerned have the duty to produce all information relevant to the issue." *Alaska Communs. Sys. Holdings v. NLRB*, 6 F.4th at 1298 (quoting *State Farm Mut. Auto. Ins. Co.*, 411 F.2d at 360); *see also* 29 C.F.R. § 102.66(b) (explaining that the Regional Director maintains "discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary.").

Here, the Regional Director issued an Order requesting an offer of proof and Starbucks timely provided its response with specific offers of proof. Starbucks' offer of proof indicated that expert witness Dr. Abby Turner would testify about the underlying data related to interchange if called to testify at the hearing. Therefore, the Regional Director exercised her discretion to move forward with the hearing and afford Starbucks of its rights to present evidence. On these facts, there is no basis on which Petitioner may legitimately challenge the Regional Director's exercise of her discretion to permit Starbucks to present evidence via its RFR under Rule 102.67(d). Accordingly, Petitioner has not and cannot prove a departure from Board precedent as the Regional Director was within her discretion to find the evidence in Starbucks' offer of proof sufficient to introduce into the record.

II. No Decision or Ruling Resulted in Prejudice to Petitioner, Thus, Grounds #2 and 3 for Petitioner's RFR are Unavailable.

The Regional Director did not err in deciding a substantial factual issue, and Petitioner does not point to any such error, therefore, Ground #2 is not available to resuscitate Petitioner's RFR. While Petitioner may contend Ground #3 is available because of the conduct of the hearing or a ruling, it is not because Petitioner cannot credibly state it has suffered prejudice as a result of the Regional Director's decision to permit Starbucks to introduce evidence.

Petitioner suffered no prejudice because it received exactly what it sought in filing its petition, irrespective of the particulars of the hearing: an election directed for a single-location unit. Indeed, in footnote 1 of its RFR, Petitioner makes plain that it does not challenge the D&DE issued by the Regional Director. Petitioner cannot have it both ways and claim prejudice while agreeing with the D&DE. Accordingly, the conduct at the hearing did not result in any prejudice to Petitioner. Petitioner's complaint is nothing more than nonconsequential grouching about after it prevailed, which does not warrant the Board's time or attention.

III. There is no Compelling Reason to Change an Important Board Policy Thus, Ground #4 for Petitioner's RFR is Unavailable.

Petitioner's RFR likewise fails to identify an "important Board rule or policy" that warrants reconsideration. Rather, Petitioner broadly argues that Starbucks, by seeking to attend and fully participate in representation hearings as permitted under law, is abusing the NLRB's process and should be denied such rights. At the core of the NLRA is Starbucks right to participate in pre-election hearings to present evidence as the newly petitioned-for single-store units. 29 U.S.C. § 159(b).

Petitioner, however, characterizes these single-store unit hearings as "meaningless" and incorrectly states that there is "no counterbalancing policy reason to justify" these hearings. The reality is that Starbucks maintains the right pursuant to Board rules and law to present evidence in response to each single-store petition, which involve different employees and different facts related to such employees. Petitioner cannot seek to deprive Starbucks of its right to present evidence when it is Petitioner's decision to organize Starbucks' stores in piecemeal fashion based on its extent of organizing. Seeking to deny Starbucks of its rights to present evidence is hardly an "important Board rule or policy" that warrants NLRB reconsideration.

Petitioner also points to the volume of Starbucks representation cases pending as evidence that the Regional Director should have precluded Starbucks from proceeding. This is an absurd argument. Petitioner, not Starbucks, has caused this flood of single-store petitions. While Petitioner would prefer for Starbucks to acquiesce to its organizing without argument or opposition, Starbucks is within its rights under the Act to respond to each petition when filed. That Petitioner's actions have proved a drain on the Board is not the fault of Starbucks, and Starbucks does not act wrongly when it engages in the legal process set forth in the Board's Rules & Regulations to advance its contrary position as to petitioned-for unit scope. Petitioner, not

Starbucks, is in control of the volume of petitions as well as the scope of each petition (single store rather than market or district). If Petitioner believes that the situation at the agency is nearly untenable, it maintains the unilateral ability to remedy the situation, as the unprecedented volume is its own creation.

CONCLUSION

Simply put, Petitioner's arguments are without factual foundation or grounding in the rules and case law. Petitioner again seeks an extraordinary remedy despite having suffered no harm, having waived many opportunities to make the argument it now makes here, and after getting the result it desired from the hearing about which it now complains.

What Petitioner truly seeks to do is to deprive Starbucks of its right to participate in pre-election hearings. Were the Board to agree with Petitioner's arguments, it would be a slippery slope toward depriving all employers of the right to participate in representation case proceedings. Such a result is fundamentally at odds with due process, as well as the Board's rules and many decades of case law.

Further, the Board has already told Petitioner in the Williamsville Place matter (Case No. 03-RC-292127) that these arguments are not viable as they "raise no substantial issues warranting review." Despite this definitive statement and decision, Plaintiff has filed this second — nearly identical — Request for Review which only further unnecessarily expends the Board's resources.

For all of the above reasons, as well as the reasons set forth in the Board's Order on May 9, 2022, the Board should deny Petitioner's Request for Review. Should the Board fail to rule on Petitioner's Request for Review before the election in Case 03-RC-294186 is conducted, Rule 102.67(c) mandates the impounding of ballots despite Petitioner's plea to the contrary in footnote 1 of its Request for Review.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I certify that on June 9, 2022, I caused a copy of the foregoing Employer's Opposition to Petitioner's Request for Review to be e-filed and served electronically upon the following:

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